No. 10,501

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES GROMER DICKINSON and DORIS MAY DICKINSON (his wife), WILLIAM KEMP, and L. K. FEREVA, individually and doing business under the firm name and style of "Fereva Chevrolet Company",

Appellants,

vs.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD.,

Appellee.

SUPPLEMENTAL BRIEF FOR APPELLANTS DICKINSON FILED BY LEAVE OF COURT.

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Table of Authorities Cited

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The supplemental brief for appellee will not aid the court in solving the problem, Were the appellants Dickinson denied the right of trial by jury? Many authorities are cited in said brief on abstract principles of law. They may be accepted as correct statements as applied to the settings in which they were pronounced or to which they referred. They have no practical value as applied to the concrete setting disclosed by the present record.

The appellants Dickinson appear before the court as injured persons who recovered judgment against an insured to whom the appellee insurance company had issued a policy of automobile liability insurance. If, as plaintiffs, they had brought action on the policy against the insurance company, as defendant, their right to trial by jury of all the issues in such action would not be open to dispute. This would be true respecting issues of waiver or estoppel (*Dowling v. National Exch. Bank,* 145 U.S. 512, 12 S.Ct. 928, 930, 36 L.Ed 795; *California Packing Co. v. Lopez,* 207 Cal. 600, 603, 279 P. 664), issues of fraud (*Pacific Indemnity Co. v. McDonald,* C.C.A. Or. 1939, 107 F. 2d 446; *Ettelson v. Metropolitan Life Ins. Co.,* C.C.A. N.J. 1943, 137 F. 2d 62), and issues of release (*Jordan v. Guerra,* 23 A.C. 467, 144 P. 2d 349; *Magee v. Fasulis,* 57 Cal. App. 2d 275, 282-9, 134 P. 2d 815; *Gajanich v. Gregory,* 116 Cal. App. 622, 630, 3 P. 2d 389). In such action all issues in the case would have been submitted to a jury under appropriate instructions virtually paralleling the jury charge in the present record. (T. 400-419.)

Here, however, the insurance company took the initiative as plaintiff and filed an action for declaratory relief, and the injured persons came in as defendants and cross-claimants. The usual line-up of parties was reversed or inverted, but the same issues were litigated. Reduced to simple terms, the determinative question here is whether such reversing or inverting of parties deprived the injured persons of their right to trial by jury.

It is unnecessary to look further than the decision of this court in *Pacific Indemnity Co. v. McDonald,* 107 F. 2d 446, for a complete answer to the question. Quoting from pages 448 and 449:

> "In the case at bar we have an appellant who has executed an insurance policy and who anticipates that an action will be brought upon that insurance policy by the person insured or by an injured person subrogated to his rights. The insurance company claims that it has a just defense to this action arising out of the conduct of the injured person. The issue of fraud and collusion for the purpose of obtaining a judgment by the injured person against the insured is in legal effect no more than an allegation of non-cooperation. In the absence of the insurance policy and its agreement for cooperation the insured would have a perfect right to confess judgment in favor of the injured person regardless of whether or not there was any legal liability for the injury. It follows from what we have said that we simply have a situation herein where a party who has issued a policy of insurance anticipates a suit thereon by the insured or one subrogated to his rights and to avoid delay brings the matter before the court by petition for declaratory relief. In such a proceeding, although the parties are reversed in their position before the court, that is, the defendant has become the plaintiff, and vice versa, the issues are ones which in the absence of the statute for declaratory relief would be tried at law by a court and jury. In such a case we hold that there is an absolute right to a jury trial unless a jury has been waived. This is the view of the Circuit Court of Appeals for the Fourth Circuit (Aetna Casualty & Surety Co. v. Quarles, 92 F. 2d 321); and

the Circuit Court of Appeals for the Third Circuit (United States Fidelity & Guaranty Co. v. Koch, 102 F. 2d 288).

Decisions of courts, when the right to trial by jury has been involved in cases arising in different forms of action, point to the same conclusion. For instance, in a decision of the Supreme Court of California (*Donahue v. Meister,* 88 Cal. 121, 25 P. 1096, 1098) dealing with the right to a trial by jury in a statutory action to quiet title, the court made the following statement which is pertinent to the question involved in the case at bar:

'If, under these circumstances, defendant had commenced an action against plaintiff to recover possession, it would have been conceded by all that either party would have been entitled to a jury trial. But it is equally clear that plaintiff, by first bringing suit and thus inverting the parties, could not deprive defendant of his right to a jury.' * * *."

The force of the case just cited is not impaired by any case cited in the supplemental brief for appellee. It is plain authority for a rule that shuffling the line-up of parties did not shuffle the right of trial by jury. The right existed as to all issues submitted to the jury under the instructions of the court. Preservation of the right therefore required that the verdict of the jury on all such issues be accepted by the trial court as binding. Deprivation of the right is manifested in the rejection of the verdict by the trial court.

The said brief makes no mention of the case of *Ettelson v. Metropolitan Life Ins. Co.,* C.C.A. N.J.

1943, 137 F. 2d 62 (certiorari denied by Supreme Court), cited at page 3 of the reply brief for these appellants. There the action was by the beneficiaries under a life insurance policy executed in New Jersey. The insurance company filed a counterclaim seeking cancellation and rescission of the policy on the ground of fraud. The law of New Jersey drew a distinction between "legal" and "equitable" fraud—the former being available as a defense to an action on the policy at law, and the latter being available only as the basis for affirmative relief in equity. The trial court ordered that prosecution of the action by plaintiffs be stayed until the counterclaim was heard. It was persuaded that the rule of *Erie R. Co. v. Tompkins,* 1938, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 118, 114 A.L.R. 1487, required such ruling. This order was reversed. Quoting from pages 65 and 66:

> "Having concluded that the rule of Erie R. Co. v. Tompkins does not affect the procedure in the pending case, the final question is whether the defendant is entitled to have its counterclaim heard by the court, as though the judge was sitting in equity, before the present rules, or whether plaintiffs are entitled to have the issues heard by a jury. Although under the Federal Rules of Civil Procedure claims and defenses formerly cognizable either at law or equity have been merged into one action, a civil action, the rules have neither enlarged nor diminished the right to either a jury or court trial. Basic issues formerly triable as of right by a jury are still triable by a jury as a matter of right. Rule 39, 28 U.S.C.A. following section 723c. The same obtains when the right previously existed to have an issue tried by the

court. We must then inquire whether prior to the adoption of the Federal Rules of Civil Procedure a defense of 'equitable' fraud to an action for the proceeds of a life insurance policy was within the exclusive jurisdiction of equity. If it was, then there is no right to the jury trial demanded and defendant's contention that the matter raised in the counterclaim should be tried by the court must be sustained, not because of Erie R. Co. v. Tompkins, but because that is the federal court law on the subject.

We turn then to the federal decisions. The general rule pronounced by the Supreme Court is that in insurance cases, in the absence of special circumstances, which are not present here, 'fraud in the procurement of insurance is provable as a defense in an action at law upon the policy, resort to equity being unnecessary to render that defense available.' (American Life Ins. Co. v. Stewart, 1937, 300 U.S. 203, 212, 57 S.Ct. 377, 379, 81 L.Ed. 605, 111 A.L.R. 1268, and other cases cited.)

In one of these decisions, however, is the distinction between 'legal' and 'equitable fraud' expressly drawn. . . . We find federal decisions going back for more than a hundred years in which, in suits on insurance policies, the question of fraud whether consisting of conscious or innocent misstatement or nondisclosures has been tried by a jury in an action at law on the policy. (Cases cited.)

Our conclusion is, therefore, that the federal rule is as broad as its statement and covers all that may be included in the term fraud, whether characterized by the adjective 'legal' or 'equitable'. The issue on such a defense was tried by a jury

prior to the present rules; it continues to be so triable since."

These appellants find no occasion to pursue an inch by inch examination of the cases and texts contained in the supplemental brief for appellee. They are satisfied that the cases herein cited demonstrate that the verdict of the jury in their favor was binding on the trial court as to all issues submitted to the jury, and that when the trial court deprived appellants of that verdict and made and entered findings and judgment contrary to it, denial of the right of trial by jury was unmistakable.

CONCLUSION.

It is again respectfully submitted that the judgment should be reversed.

Dated, Chico, California,
June 5, 1944.

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Attorneys for Appellants Dickinson.